UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 9243.

JOHN T. WATSON, LIQUIDATING RECEIVER OF AND FOR THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW MEXICO, APPELLANT,

VS.

REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, A CORPORATION, H. B. HERSHEY, RECEIVER OF MISSISSIPPI VALLEY LIFE INSURANCE COMPANY, R. E. O'MALLEY AND WILLIAM E. CAULFIELD, RECEIVERS, J. G. VAUGHAN, M. J. DOUGHERTY, GRACE V. ROWELL, FORMERLY GRACE V. WALLACE, WILLIAM H. WALLACE, A MINOR, ANNA LOUISE WALLACE, A MINOR, R. L. DANIEL, CHAIRMAN OF THE BOARD OF THE INSURANCE COMMISSION OF THE STATE OF TEXAS, APPELLEES.

REPLY BRIEF OF APPELLANT.

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REPLY BRIEF OF APPELLANT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant desires to reply to the answering brief of the appellees filed in the above-styled and numbered cause, and we hope by the reply to simplify the issues so as to aid the court in arriving at their decision, and to that end will reply to the assignments in their numerical order as set out in appellees' brief.

FIRST POINT.

Has appellant the right to bring this suit to foreclose an equitable lien which stands against the property described in our complaint?

The existence of the lien is not questioned by the receiver of the Mississippi Valley Life Insurance Company, nor by Mrs. Rowell (formerly Mrs. Wallace), who we allege are the record owners of the property, and by joining everyone who makes some claim we feel that, all necessary parties being before the court, the court can determine the equities if we are allowed to proceed upon the merits.

ARGUMENT AND AUTHORITIES.

So there is no question, it should be remembered, that we claim ownership of the securities or indebtedness forming the basis of our suit:

1. By assignment from the insurance commissioner of the State of New Mexico (see Exhibit C, Tr. pp. 51-53).

2. By the fact that we are the liquidating receiver appointed by the District Court of New Mexico, by an order adjudicating that "the assets are insufficient to pay the claims now filed," so the appellant was by an order vested with authority to bring this suit (Exhibit B, Tr. p. 50).

3. That the receiver of the Mississippi Valley Life Insurance Company was made a party defendant and he admits not only our lien and claim, but also our ownership of the lien, and further pleaded (referring to Ex-

hibit K, Tr. p. 77, under which the appellees, Republic Life Insurance Company, J. G. Vaughan, and M. J. Dougherty, must claim if any claim they have):

> "4. That he admits, as alleged in Paragraph XVI, the execution on May 18, 1932, of the contract, copy of which is attached to the bill of complaint and marked Exhibit 'K,' with the defendant, Republic Life Insurance Company of Dallas, Texas, in accordance with the order of the court dated May 18, 1932, in and by which said agreement said defendant agreed to assume the policy obligations of said Mississippi Valley Life Insurance Company, including the aforesaid registered policies issued by the National Life Insurance Company of the Southwest, but charging against each policy so assumed a lien in the amount of the whole legal reserve thereon, and avers that said contract did not purport to or as a matter of law did not affect or contemplate transfer of title to the property described in the bill of complaint, and further avers that said contract did not affect the rights and lien of the superintendent of insurance of the State of New Mexico but was intended to be a contract of reinsurance only in accordance with the tenor and effect thereof, as this defendant verily believes from the records" (Tr. pp. 21, 22).

And, also, we presented a petition (Tr. p. 3) on March 22, 1939 (Tr. p. 20), prior to filing the suit, and Judge Ling granted us leave to bring the suit.

It should also be remembered that:

1. This is a suit to foreclose an equitable lien of $32,000.00 on the property described in the bill of com-

plaint (Tr. p. 3), and we merely attempted to make all parties defendants who may assert some sort of a claim to the land, and those who have not disclaimed have admitted our lien, except the appellees, The Republic Life Insurance Company of Dallas, Texas, and M. J. Dougherty, who filed motion to strike (Tr. p. 84).

2. Nowhere does either of the appellees assert ownership of the land nor of the equitable mortgage unless it be through Exhibit K (attached to the complaint, Tr. pp. 77-83), and under the second clause of paragraph number three, which provides in substance that appellee, Republic Life Insurance Company of Dallas, recognizes that there are securities *now on deposit* with the insurance department of the State of New Mexico, and that the appellee shall be entitled to only the value of the reserves on the policies they assume, and then only *if the policyholders accept the assumption*, but then they are to have the reserves credited to it in such manner as the insurance department of the State of New Mexico shall approve (Tr. p. 80). But under Exhibit "K" all excess was to belong to the primary receiver of the Mississippi Valley Life Insurance Company, who was Alvin S. Keys, but is now H. B. Hershey, and who is before the court, and admitting our right of action and our ownership.

3. There is no pleading by appellee, Republic Life Insurance Company of Dallas, that they did assume any of the policies, nor that the policyholders accepted the assumption, nor do they plead any title, and we plead

they have no legal or equitable title to either the land or the lien (Tr. pp. 38-40).

4. That clause number three of Exhibit K (Tr. p. 79) charges them to make their claim to such securities, if any they have, in such manner as the insurance department of the State of New Mexico shall approve (Tr. p. 80).

5. It appears from Exhibit B (attached to the complaint, Tr. p. 50) by the title to the order in the receivership in New Mexico authorizing this suit, that both the defendant, H. B. Hershey, receiver of the Mississippi Valley Life Insurance Company, and also appellee, Republic Life Insurance Company of Dallas, Texas, were defendants in the suit in the District Court of the State of New Mexico, and are also parties herein, and are bound by the judgment of the District Court of New Mexico, holding it was necessary to liquidate this asset and authorizing this appellant to bring the suit.

We have covered this question by short references and citations in our opening brief (pages 21-25).

We think also:

(1) That Rule 9-a of the new Rules of Civil Procedure for District Courts of the United States gives us the right to sue and this rule also prohibits the appellees from raising the question except by answer.

(2) That Article 3727 of the Revised Code of Arizona, 1928, also gives us as the real party in interest the right to bring the suit.

(3) We are acting as a trustee only for the purpose of liquidating a specific fund and with reference to this fund we are in the nature of a trustee for the benefit of certain registered policyholders only, not for the general creditors nor holders of any other policy except those registered.

Restatement of Law says:

> "The trustee can maintain such actions at law or suits in equity or other proceedings against a third person as he could maintain if he held the trust property free of trust."
>
> Restatement of Trusts, Section 280, see particularly Section 280-h.

The Supreme Court of Texas says all securities deposited to secure policies are a special trust fund, and discussed the matter fully in an excellent opinion.

Phillips v. *Perue*, 111 Tex. 112, 229 S. W. 849:

This case has been reviewed by many courts, and all follow it.

See, also, the New York court's review of the case, *In re Phillips*, 200 N. Y. Supp. 639.

We are in the same position as the liquidating receiver whose actions were questioned by the commissioner of insurance of the State of Kansas, and by the State of Kansas, and in these cases Judge Bratton of the Tenth Circuit held that the court in the exercise of its equity powers can appoint a liquidating receiver to foreclose and the receiver was handling the securities deposited with the insurance commissioner in conjunction with

the reinsurer, both of whom are acting under the orders of the court.

Hobbs v. *Occidental Life, etc., Co.*, 87 F. (2d) 380:

In this case the Occidental was handling the securities subject to a court order and within the jurisdiction of the court appointing the liquidating receiver.

The Republic Life Insurance Company could do this by going into the District Court of New Mexico, in cause No. 14867, in the case of *Richard C. Dillon, for himself and others similarly situated, vs. George M. Biel, Superintendent of Insurance of the State of New Mexico, the Receivers of Mississippi Valley Life Insurance Company and The Republic Life Insurance Company of Dallas* (see Exhibit B, Tr. p. 50), and there ask for that which under their contract they are entitled, following the same procedure that Occidental Life Insurance Company did. If they would do this, we cannot see where the registered policyholders, the Mississippi Valley Life Insurance Company, the appellee, or anyone else, would lose, for we do not think this court would question the *bona fides* of the State District Court of New Mexico.

This position is quite fully discussed by Circuit Judge Bratton in *Kansas* v. *Occidental Life*, 95 F. (2d) 935.

In a case much like ours the United States District Court also held that the court in the exercise of its equitable jurisdiction will afford complete relief to all parties.

Holloway v. *Federal Res. L. I. Co.*, 21 Fed. Supp. 516.

Now, as we view the position of the Republic Life Insurance Company of Dallas, they desire, by setting up obstacles, to avoid that part of their contract requiring them to make representations to the insurance department of the State of New Mexico, and receive credit for any reserves to which they may show themselves entitled as provided by Exhibit K (Tr. p. 80), or make their claim in the state court so their rights to the securities can be determined.

Appellant feels the New Mexico court is the place for appellee to make its claim for the assets, if any it has, and not the Arizona courts.

In a case where the question of the rights of claimants of assets of an insolvent surety company were under consideration, it was so held, and Mr. Justice Brandeis said:

> "The court, which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies relating thereto. It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other court to interfere with such possession and jurisdiction."
>
> *Lion Bonding & S. Co* v. *Karatz,* 262 U. S. 77, 67 L. Ed. 871, 880.

And he further held the state court has sole jurisdiction over the assets in their possession and the state court's action cannot be questioned except by an appropriate proceeding for that purpose.

The question as to the right of a receiver to liquidate assets deposited with the corporation commissioner was raised about as appellee questions appellant's right, and the Kansas court held that the liquidating receiver was the proper official to foreclose and liquidate them.

Meyers v. *Kansas State Corp. Com.*, 33 Pac. (2d) 308, 139 Kan. 890.

However may have been the ruling in the years past, and whether we are controlled by the case of *Boothe* v. *Clark* or the case of *Relf* v. *Rundle*, we hold title to the lien sued upon, which is not denied by anyone, and the Supreme Court of the United States, speaking through Mr. Justice Sutherland, in a case appealed from your court, said:

> "A foreign receiver may maintain such a suit, so far at least as the federal courts are concerned, where the title to the property in question has been vested in him by conveyance or statute, and especially where the receivership property has been assigned to the re-receiver by its owner, the suit is brought not strictly in his capacity as receiver by virtue of his appointment in another state, but in his capacity as assignee."

And in the footnote at the end of the decision is quite an annotation, which seems to settle any uncertainty, if there be one, for they say that:

> "It is to be observed that the decision in the reported case settles the question as to whether permitting a foreign receiver to sue under such circumstances is a matter of right or comity. Since the Supreme Court of the United States takes the view that

it is a matter of right, it follows that it is a right which will be protected under the full faith and credit clause of the Federal Constitution, under the doctrine of *Converse* v. *Hamilton,* 224 U. S. 243, 56 L. Ed. 749."

Oakes v. *Lake,* 290 U. S. 59, 78 L. Ed. 168.

We therefore say that there does not seem to be any question but what the plaintiff has a legal right in the United States District Court to bring this suit.

SECOND POINT.

The second assignment of error merely questions the right of John T. Watson, as liquidating receiver, to bring the suit to establish the lien and foreclose it, appellee contending:

1. We do not state amounts due the policyholders of the National Life of the Southwest.

ARGUMENT AND AUTHORITIES.

We covered this question in our opening brief, pages 25 to 28, and we feel the cases therein cited sufficiently cover our view, for we are of the opinion that when the District Court of New Mexico found in the judgment (Exhibit B, Tr. p. 50) that "the assets in hand of receiver were not sufficient to pay the debts," and ordered a foreclosure of this lien, it was binding on the appellee, who was made a party to the proceedings, and whether it appeared and contested or not makes no difference, it is bound the same as if the court would levy an assessment against a nonresident stockholder. That cannot be questioned any more than a stockholders' assessment made

in one state upon which a suit is brought in another state, as in the case of *Chandler* v. *Peketz,* 297 U. S. 609, 80 L. Ed. 881, in which case the Colorado courts sustained a demurrer to the receiver's suit, but the United States Supreme Court held that, even if the Colorado stockholder was not served with process in the Minnesota case, he could not collaterally question the order.

A very full and complete annotation on the "Conclusiveness of the assessment" and its "enforcibility in other states" we think will be helpful to the court.

See 80 L. Ed., pages 883-920.

Appellees state in their brief, page 24:

> "Appellant contends that neither liability nor the amount of liability need be stated in the complant because the order of Judge Chavez of the County Court of Santa Fe County, New Mexico, is conclusive. The order of Judge Chavez could not be conclusive against the appellees because they were not parties to the action in which the order was made. The cases cited by appellant have to do with stock assessments. There is no similarity between liability on a stock assessment and liability under a deposit for security."

We do not agree with appellees' position, for both assessments against stockholders and those against other debtors seem identical, for they are both the result of a judgment of a court in a receivership or insolvency proceeding.

Under their contract (Exhibit K) they are entitled to only such an amount of the New Mexico securities as

they may show themselves entitled by getting the registered policyholders to accept their assumption (Tr. p. 80), and no one knows whether any of those registered policyholders did "switch their policies" and accept Republic Life Insurance Company, and thus relieve the New Mexico deposit, except of course, the Republic Life Insurance Company themselves, and there is no showing in any pleading whether they made a claim or not, but if they have a claim it seems to us that orderly procedure would be to present it to the court where receivership is pending, as Mr. Justice Brandeis said in *Lion Bonding &. S. Co.* v. *Karatz,* 262 U. S. 77, 67 L. Ed. 871.

When the federal court assumes jurisdiction over mortgaged property, all matters in controversy can then be decided and the parties are bound by the judgment.

Trustee of an express trust a necessary party to foreclosure.

First Trust & S. Bank v. *Iowa-Wis. Bridge Co.,* 98 F. (2d) 416, cert. denied, 83 L. Ed. .....

The insurance commissioner is the trustee of an express trust holding the securities deposited by Mississippi Valley Life Insurance Company to secure registered policyholders under Section 71-155 of the New Mexico Statutes, 1929, and if there is any excess over the claims made, the court will unquestionably disburse it in accordance with the rights under the statute and the deposit agreement, except as may be changed by the reinsurance agreement, except as may be changed by the reinsurance agreement.

We therefore feel, for this error, the judgment of the district court should be reversed.

THIRD POINT.

The third assignment of error raises much the same questions raised by the first:

1. Complaint does not show any lawful right or ownership in plaintiff; or,

2. Authority to maintain this action.

ARGUMENT AND AUTHORITIES.

Appellant feels he has covered these questions under our opening brief (pages 28 to 31).

No one but Republic Life Insurance Company questions our lien or our right thereto, and nowhere do they say they have a good claim to either the lien or the land, and the question as to our right was disposed of, we think definitely, by *Oakes* v. *Lake,* 290 U. S. 59, 78 L. Ed. 168.

See, also:

Hopkins v. *Lancaster,* 254 Fed. 190.
Wright v. *Phillips,* (Cal.) 213 Pac. 288.

Appellee in its brief, pages 15-21, attempts to construe Exhibit K (Tr. p. 77), but we cannot see that section No. 3 means what appellees say, but we do think it is much like the reinsurance agreement examined by Mr. Justice Bradley, who stated the policyholders' position as follows:

> "Still the complainant might be without other remedy than that of accepting insurance in the new company, or of prosecuting the old and virtually de-

funct company, if it were not for the fund deposited with the Treasurer of Tennessee as indemnity to the citizens of that state holding policies in the company. The assignment of all its assets, by the old company to the new one, upon the consideration of its obligations being assumed by the new company, is somewhat analogous to an assignment of property by a debtor for the benefit of his creditors, in which only those creditors who are preferred or those who choose to come in and participate in the fund assigned, receive any benefit, whilst those who refuse to come in take no benefit, preferring to retain their claim against the debtor. So here, if the complainant does not choose to continue his insurance with the new company, he would have no remedy except against the old company, which is totally unable to respond, were it not for the fund which has been attached in the hands of the state treasurer of Tennessee. To this fund the complainant, being a citizen of Tennessee, had a right to resort. The object of the laws of Tennessee in requiring the fund to be placed on deposit with the treasurer was to protect and indemnify its own citizens in their dealings with the company. The assignment to the new company in Missouri could not deprive them of the right to this indemnity."

Lovell v. *St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 28 L. Ed. 423, 426.

As we view paragraph number three it is the duty of Republic Life Insurance Company to show whether or not there are any policies secured by the deposit with the insurance department of the State of New Mexico that have accepted their assumption. If not one policy-

holder did so we cannot see where they are entitled to any part of the securities, for it specifically provides the excess is to go to Alvin S. Keys, receiver (Tr. p. 80).

For this error, the judgment of the district court should be reversed.

FOURTH POINT.

The lien we allege is an equitable lien or mortgage against the property described.

Appellees cover this in their brief, pages 22 to 34.

This point we covered in our opening brief, pages 32-35.

ARGUMENT AND AUTHORITIES.

Appellees state on page 14 we do not allege what is due from the Wallaces.

We allege (Par. X, Tr. p. 33) that Two Republics Life Insurance Company fixed the amount at $32,255.00.

In Paragraph XIII (Tr. p. 35) we allege Wallaces' purchase and sale contract was a lien for $32,255.00, which was well known and understood by Mississippi Valley Life Insurance Company, and Paragraph X, H. B. Hershey, receiver, admits (Tr. p. 21).

In Paragraph XIV (Tr. p. 36) we allege that Mrs. Grace V. Wallace (now Mrs. Rowell, one of the defendants) confirmed and renewed the lien of the security in the amount of $32,000.00.

Exhibit E (Tr. pp. 55-61) shows the contract as $32,-255.00.

Mrs. Rowell in her answer (Tr. p. 89) admits the execution of Exhibit E and all the allegations of Para-

graph VII, and we think so far as the Wallaces are concerned it clearly shows that they were the purchasers of the property and there was unpaid $32,255.00.

And the receiver of Mississippi Valley Life Insurance Company also admits it.

The assignments, Exhibit F (Tr. pp. 62-64) and also Exhibit H (Tr. pp. 9-70) and also Exhibit J (Tr. pp. 75-77), show various amounts, one $30,000.00 one $32,000.00, and one $32,255.00, but this being a court of equity, the amount will be adjusted by the judgment, for the chancellor can adjust all equities, including the amount, and the rule cannot be stated any better than is stated in 19 American Jurisprudence, Section 163, page 151:

> "Such a lien may result by implication from a duty resting on the owner of property which is the subject matter of the lien, and the lien is completed by equity in pursuance of the maxim that 'that is deemed done that ought to be done.' The right of a grantor of lands to have established thereon a lien for unpaid purchase money is neither a legal lien nor an interest in the real estate; it is merely a right which is recognized in courts of chancery and which is based upon the consideration that the purchaser ought not to enjoy the property with immunity from his agreement to pay therefor. It has been held that where parties enter into an express agreement in writing, indicating an intention to make some particular property, real or personal, or a fund security for a debt or other obligation, an equitable lien is created on the property described in the contract."

And 10 Ruling Case Law, page 351, Section 100, says:

> "There are, however, certain liens, purely equitable in character as distinguished from statutory or common-law liens, which are cognizable only in a court of equity. Such a lien arises either from a written contract which shows an intention to charge some particular property with a debt or obligation, or is implied and declared by a court of equity out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings. Thus, the right of a grantor of lands to have established a lien thereon for unpaid purchase money is neither a legal lien nor an interest in the real estate. It is a right merely recognized in courts of chancery in order to protect the very general equity that the purchaser shall not enjoy the property purchased with immunity from his agreement to pay therefor. Likewise, proceedings to foreclose mechanics' liens are in their nature equitable, and are necessarily governed by the rules pertaining to chancery practice."

Many times contracts must be adjusted in courts of equity, for clients do not always do a good job in drawing their papers, and the court is called upon to adjust the equities, as in this case. There is no question as to the intention of the Two Republics Life Insurance Company, the Mississippi Valley Life Insurance Company, the Wallaces, or the insurance department of the State of New Mexico, that there was a lien for unpaid purchase money, that it was on the property Wallaces were buying, and it was deposited with the insurance department of

New Mexico to secure the registered policyholders of the National Life Insurance Company of the Southwest, and we cannot see how anyone is hurt, for no party pleads, nor do we think they can plead or prove, that they are innocent purchasers, and therefore injured by the foreclosure.

Ruling Case Law says:

> "Likewise, a lien may be created by an equitable assignment of a contract, debt or fund. It is well settled that an agreement to charge, or to assign, or to give security upon, or to affect property not yet in the ownership of the party making the contract, constitutes an equitable lien which is enforced in the same manner and against the same parties as a lien upon specific things existing and owned by the contracting party at the date of the contract."
>
> 17 Ruling Case Law, page 604, Section 13.

We think Exhibit E (Tr. 55-61) and the other instruments constitute an equitable lien, for no doubt the Wallaces recognized the obligation, and so did Mississippi Valley Life Insurance Company.

Judge Baker of the Arizona Supreme Court said, in substance, where the parties show it is their intention to give security for a debt on certain property, however informally it may be expressed, equity will declare an equitable mortgage or lien to exist.

Stephen v. *Patterson,* 21 Ariz. 308, 188 Pac. 131.

C. J. Ross of the Arizona Supreme Court also recognized equitable mortgages and liens.

Gamble v. *Consolidated, etc., Bank,* 33 Ariz. 117, 262 Pac. 612.

Contracts much the same as ours have been discussed by the Arizona courts, and some hold them liens. The equities may be adjusted in foreclosure, and some seem to indicate rescission can be had.

Coffin v. *Green,* 185 Pac. 361.
Treadway v. *Western, etc., Co.,* 10 Pac. (2d) 371.

But none go so far as to allow a purchaser to keep the property without paying that which he admits was not paid.

United Farmers Market v. *Donafrio,* 29 Pac. (2d) 144, Point 9.

This is much better treated in Ruling Case Law, under the title "Equitable Mortgages."

19 Ruling Case Law, page 273 *et seq.,* Sections 44, 45.

On page 34 appellee questions our statement with reference to the foreclosure of the John R. Wallace tract in the United States District Court for the District of Arizona. John R. Wallace and James Q. Wallace were brothers. M. J. Dougherty drew both contracts and they were identical with Exhibit E (Tr. 55), complaint being filed on this contract on July 10, 1929, in cause E-193, Phoenix, and on June 25, 1931, judgment of foreclosure was signed, and thereafter the United States marshal sold the property and it was bought in by M. J. Dougherty for the Mississippi Valley Life Insurance Company. Reference to the assignments, Exhibit F (Tr. 63) and Exhibit H (Tr. 69) shows both liens handled by Two Re-

publics Life Insurance Company, and we think that appellee is in error as to his statement.

We think the district court should have held that we have plead an equitable mortgage or lien, and compelled the appellees to answer to the merits, as required by Rules 8 and 9 of Rules of Civil Procedure, as the real obligors of the lien recognize it, and the court of equity can then adjust everyone's rights therein.

FIFTH POINT.

Is our action barred by limitations or laches?

This is covered by appellees' brief, pages 34 to 41.

We have briefed the question in our opening brief (pages 35 to 41) and we ask consideration thereof.

ARGUMENT AND AUTHORITIES.

We think this question should be raised by affirmative pleading, as stated in Rule 8-c, and not by a "speaking demurrer."

The defendants who owe the money do not plead limitations, that is, Mississippi Valley Life Insurance Company or Mrs. Rowell (Mrs. Wallace).

There is no showing that Republic Life Insurance Company of Dallas has an agent within the State of Arizona, and whether they are or are not the debtor, they do not have the legal right to set up by motion this defense, and no one other than Republic Life Insurance Company attempts to raise the issue, and they are absent from the state under Article 2066, Revised Statutes of Arizona, 1928.

Appellees in their brief (p. 37) say they have searched diligently and cannot find a case holding Republic Life Insurance Company could not plead limitations. We call their attention to:

Nevada, etc., Co. v. *Berryhill,* (Nevada) 75 Pac. (2d) 992.

Hale v. *St. Louis & S. F. Ry.,* (Okla.) 134 Pac. 949.

O'Brien v. *Big Casino, etc., Co.,* 9 Cal. App. 283, 99 Pac. 209.

The federal courts adhere to the doctrine of laches, and as Justice Kenyon said, if the delay is not prejudicial no one is injured, as it is to aid justice, not defeat it.

Spiller v. *St. Louis & S. F.,* 14 F. (2d) 284.

The Circuit Court of Appeals, Fourth Circuit, discussed this in *Hall* v. *Ballard,* 90 Fed. 939, and so did Justice Philips of the Tenth Circuit: *Standard Oil Co.* v. *Standard, etc., Co.,* 72 F. (2d) 524, cert. denied.

There must be inexcusable delay, and it must result in prejudice to the defendant.

There can be no prejudice by any delay and Mrs. Rowell (Mrs. Wallace) in her answer admitted the obligation was extended two years from January 16, 1931 (Clause V, Tr. p. 90), making January 16, 1933, and suit was filed March 22, 1937 (Tr. p. 20). However, if this cannot be raised, except as provided by the Rule 8-c of Code of Civil Procedure, the court committed error if the demurrer was sustained on the fifth ground.

Summary.

In closing, allow appellant to say that we feel we are trustees of an express trust, holding title to the equitable

lien for only one definite purpose, to liquidate the securities deposited with the insurance department of the State of New Mexico, for the benefit of the registered policyholders of the National Life Insurance Company of the Southwest, and no party, whether in this suit or in New Mexico, has any right to divert the securities to any other purpose.

Appellant is trustee and comes within Rule 9-a of the Rules of Civil Procedure and has a right to sue in this court to foreclose the equitable mortgage sued upon.

Appellee takes the position that the case of *Booth* v. *Clark,* 17 Howard 322, prohibits our suit. We say we are governed by *Relf* v. *Rundle,* 103 U. S. 222, and have the right to sue, and we back it up by *Oakes* v. *Lake,* 290 U. S. 59.

Appellees on page 8 of their brief say:

> "We do not question that a statutory receiver who acquires title by virtue of a statute, may ordinarily sue in a foreign jurisdiction, or that a trustee of an express trust may sue in his own name. Such is the holding in *Relf* v. *Rundle,* 103 U. S. 222, and *Bernheimer* v. *Converse,* 206 U. S. 516, cited by appellant. We contend, however, that the record does not show appellant to be either a statutory receiver, an owner, or a trustee of an express trust."

In *Relf* v. *Rundle* the Supreme Court said of the insurance commissioner:

> "He is the trustee of an express trust, with all the rights which properly belong to such a position, etc."

Restatement says:

> "An interest held by a trustee, as such, may be transferred by him to a successor trustee, although such an interest, if held by a person for his own benefit, would not be transferable."
>
> Restatement of Law of Trusts, Section 111.

And Section 280 of Restatement of Trusts says we may sue on them and not necessary to describe himself as trustee.

> Restatement of Law of Trusts, Section 280-h.

The Arizona statutes also give that right.

Holding as trustee an assignment of the lien from the statutory trustee and also authority of the district court to bring this suit, and having possession of the security, we should come within *Oakes* v. *Lake,* and should have the right to sue, and we stand exactly under the reasoning of the court in *Hobbs* v. *Occidental Life,* 87 F. (2d) 380.

The Missouri laws, like those of New Mexico, fail to provide for liquidation by the insurance commissioner, and Judge Reeves of the Western District of Missouri, in a situation about like ours, said:

> "It becomes the duty of the court to direct the collection by its receiver of all the assets of the company, so that same can be equitably and properly applied to the discharge of the obligations of said company. The court alone is capable of determining what priorities, preferences and liens may be allowed and enforced against such assets. The responsibility of the superintendent of insurance as an executive of-

ficer is completely discharged when a court whose duty it is to administer the estate, calls for a surrender and delivery of said assets."

Holloway v. *Federal Reserve, etc., Co.,* 21 Fed. Supp. 516, 518.

We also filed a petition for leave to bring this action (Tr. p. 3) and it was filed in this cause on March 22, 1937 (Tr. p. 20), and we do not understand why it was filed unsigned nor why the transcript shows no order was entered, but the writer of this brief knows it was presented to Judge Ling and after hearing he granted appellant leave to file our first bill of complaint. We therefore feel we are properly in court and should have the right to proceed on the merits.

In addition to the case of *Oakes* v. *Lake,* we think the Good case is helpful.

"* * * Thus we have statutory receivers as distinguished from chancery receivers; but this distinguishing feature does not of itself determine the receiver's right to sue in a foreign jurisdiction. This right depends entirely upon whether or not the statute gives him the power. What is SUFFICIENT POWER for this purpose has been well settled as BEING A TITLE to the property vested in the receiver as ASSIGNEE or as statutory successor of the insolvent corporation (citing cases. Italics ours)." And they overruled the demurrer and sustained the receiver's action.

Good v. *Derr,* 46 F. (2d) 411, cert. denied, 75 L. Ed. 1457.

See, also: *Friede* v. *Sprout,* 2 N. E. (2d) 549 (Mass.).

Appellees make this statement in their brief, page 37:

> "In the case at bar the Wallaces (the alleged debtors under the escrow contract) were at all times residents of Arizona. The appellee, *Republic Life Insurance Company, and the appellee, J. G. Vaughn, were in nowise obligated under the contract and the only necessity of their being made parties is that they obtained an interest in the property subsequent to the date of the alleged equitable mortgages.* The Wallaces have been amenable to personal service at all times and the Republic Life Insurance Company and Vaughn have been amenable to substituted service which is sufficient to test their rights to the property if, as alleged by appellant, their rights are subject and subordinate to the appellant's alleged lien."

If this statement is true, why should they not answer, and try out their right, if they "obtained an interest in the property subsequent to the date of the alleged equitable mortgage."

Under this statement they are necessary parties to the foreclosure, and they must take the title as they found it.

Appellant, therefore, asks that upon due consideration of all matters in controversy, that this court reverse the judgment of the Honorable District Court of Arizona, and overrule the motions to strike, and enter such orders herein as in their judgment they think are right and necessary in the premises, for which they pray.

That G. W. Silverthorne and Kent Silverthorne of 311 Phoenix National Bank Building, Phoenix, Arizona, are

attorneys for appellees, and a copy of this reply brief is being mailed to them.

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